UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EIGHT MILE STYLE, LLC, and MARTIN AFFILIATED, LLC,

Plaintiffs,

vs.

APPLE COMPUTER, INC. and AFTERMATH RECORDS d/b/a AFTERMATH ENTERTAINMENT

Defendant.

Case No. 2:07-cv-13164
Hon. Anna Diggs Taylor
Magistrate Judge Donald A. Scheer

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EMERGENCY MOTION TO RESOLVE DISCOVERY ISSUES

NOW COME Plaintiffs Eight Mile Style, LLC and Martin Affiliated, LLC by and through their attorneys, King & Ballow and Hertz Schram PC, and respectfully request that this Court enter an Order allowing Plaintiffs to reschedule the production dates and related depositions of the third party entities Plaintiffs have subpoenaed to a date before July 4 in order to accommodate the third parties. In support of their Emergency Motion to Resolve Discovery Issues, Plaintiffs state as follows:

Defendants' motion for summary judgment, Defendants' motion to bifurcate, and Plaintiffs' motion to exclude late-produced documents were heard by the Court on December 4,

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2008. *See* Doc. Nos. 117, 118. Plaintiffs' motion to exclude late-produced documents was based upon the fact that, following the initial discovery period, Defendants produced almost 1000 pages of documents, which they claimed to be licenses from third parties, and which they claimed gave them defenses to Plaintiffs' infringement claims, at least as it related to certain particular compositions. Doc. No. 80.

The Court denied Defendants' motion for summary judgment, finding that genuine issues of material fact existed, which required the issue to be tried. Doc. No. 118. The Court ruled, with respect to Plaintiffs' motion to exclude, that Plaintiffs were entitled to take whatever discovery they thought necessary on the late-produced documents. Busch Decl. ¶ 2, Ex. 1 at 52:17-54:5. The Court placed no limitations whatsoever on the discovery. *Id.*

As a result of other litigation between the parties, a discovery scheduled was entered, and then amended, to allow discovery to be completed by June 10, 2009. Doc. No. 119.

The parties served written discovery and agreed to certain extensions, and written responses were ultimately provided by Defendants on May 8, 2009. Plaintiffs' discovery sought, among other things, information about whether the documents upon which Defendants rely are licenses, and whether the third parties had any right to grant licenses. Busch Decl. ¶ 3. Plaintiffs' written discovery was met with objections, and Defendants have not produced any documents as of today in response to these requests.[1]

[1] Defendants have finally produced the "financial" documents from Aftermath Plaintiffs sought in discovery over a year ago in a prior set of requests, which Defendants objected to producing previously due to their then-pending motion to bifurcate. Defendants also promised to produce "financial" documents from Apple, which are relevant to Plaintiffs' proving damages, but have yet to do so. Defendants first promised to produce those documents from Apple by Friday, May 29. Guilford Decl. ¶ 3. Late that day, Defendants stated they hoped to produce the Apple documents on Monday, June 1, but they still have not done so and have not answered Plaintiffs' most recent inquiry about when to expect those documents. *Id.* Defendants have also refused to provide a date for the 30(b)(6) deposition of Apple, which the parties discussed in the May 27 meet and confer and tentatively agreed would take

On May 27, 2009, the parties held a meet and confer to address: (1) Defendants' discovery responses; (2) Plaintiffs' discovery responses; and (3) dates for depositions. Plaintiffs served two 30(b)(6) deposition notices on Defendants on May 15, 2009, one for each Defendant, but Defendants had not committed to dates for the depositions by May 27, 2009. Busch Decl. ¶ 6. Defendants had served their own pair of 30(b)(6) notices on Plaintiffs and had also sent three subpoenas to third parties on or about May 18, 2009.[2] Busch Decl. ¶ 8. During the May 27 meet and confer, Defendants agreed to reconsider certain objections to Plaintiffs' written discovery, and agreed to extend the time for taking of depositions noticed for completion during the discovery schedule to July 4, 2009.[3] *Id.* ¶ 7. Defendants still did not provide dates for the 30(b)(6) witnesses of Apple or of Aftermath, of which they said there would be three. *Id.*

Following the May 27 telephone call, Plaintiffs concluded that they would need certain documents and depositions from third parties and sent out subpoenas on May 28, 2009 to the following: (1) EMI Music Publishing, returnable on June 9, 2009; (2) Universal Music Publishing, returnable on June 9, 2009; (3) Warner Chappell Music, returnable on June 9, 2009; (4) Almo Music/Rondor Music International (which Plaintiffs believe to be owned or administrated by Universal Music Publishing), returnable on June 9, 2009; and (5) the Harry Fox Agency, returnable on June 8, 2009. Busch Decl. ¶ 9. The subpoenas were narrowly tailored to request little more than the administration or co-publishing agreements between certain artists

place on June 4 or June 5. *Id.* ¶ 4.

[2] As discussed below, Defendants noticed these third party depositions for dates on which Defendants knew Plaintiffs were not available. Busch Decl. ¶¶ 4-5.

[3] With what had then been noticed, the parties were attempting to schedule six depositions over a two-week period of time. Counsel for Plaintiffs responded that he was unavailable to conduct or defend depositions on June 3 and June 10 due to a personal commitment and a court hearing in Nashville, Tennessee, respectively, and asked defense counsel to reschedule the depositions noticed without consulting on dates. Busch Decl. ¶ 6. While a date for the 30(b)(6) deposition of one of the Defendants was discussed, although still not definitely confirmed, counsel for Defendants advised the other defendant would have three 30(b)(6) representatives and they had not yet found a date when all three would be available. *Id.* ¶ 7.

and these publishers in order to discern whether the artists had any right or ability to license anything to Defendants. The subpoena to the Harry Fox Agency was also narrow, asking only for a small set of documents concerning one aspect of their practices and procedures.

Plaintiffs intend to go forward with these depositions as noticed within the discovery schedule if the third parties are able to do so and defense counsel are available. We have heard from three of the subpoenaed parties, the Harry Fox Agency, Warner Chappell Music and EMI Music Publishing, who have all said they are willing to work with us but have asked for additional time to respond.[4] Busch Decl. ¶ 11; Guilford Decl. ¶ 6. Plaintiffs asked Defendants to agree to allow these depositions to be able to be taken before July 4, 2009 per the parties' agreement, along with the other depositions scheduled, including Defendants' third party depositions, but Defendants have refused. Busch Decl. ¶ 9. These depositions will be short and are primarily necessary to authenticate the documents the third parties are producing.

Defendants stated that they are refusing the requested extension because Plaintiffs did not identify these depositions in the conversation on May 27, 2009, and because Plaintiffs have already taken 10 depositions in this action. Busch Decl. ¶ 10. Both of the proposed grounds to object are nonsense. Plaintiffs did not conclude these depositions would absolutely be needed until discussing the issues following our call with Defendants on May 27, 2009, and based upon certain objections Defendants that Plaintiffs should seek the information from third parties. In addition, the depositions were noticed for a time within the discovery schedule. As to the 10-

[4] One of the subpoenaed parties is Universal Music Publishing Group ("UMPG"), and another is owned or administered by UMPG, an entity related to the Defendants herein. Plaintiffs have attempted to contact UMPG on several occasions to confirm that they will appear for the depositions but they have not returned our calls and correspondence. Guilford Decl. ¶ 7. We do not know whether counsel for Defendants are advising third parties not to appear for their depositions or produce documents based upon the position they have taken with respect to this matter.

deposition issue, this Court specifically extended discovery for the purpose of allowing discovery on the license issues raised by the documents Defendants produced after the close of discovery without restriction, and Plaintiffs are taking depositions of Defendants as a result of that process. If Defendants truly believed Plaintiffs could not take any more depositions, they would have raised this issue in response to Plaintiffs' 30(b)(6) notices.[5]

Plaintiffs may be able to obtain the information they are seeking on June 8 and 9, if the third parties are available and can produce the requested information by those dates, and defense counsel is also available. In order to accommodate the third parties' scheduling needs, however, Plaintiffs are simply asking for the ability to schedule the depositions between June 10 and July 4. There is absolutely no prejudice to Defendants and they have agreed to such extension for the depositions of the parties between them.

WHEREFORE, for all the above-stated reasons, Plaintiffs respectfully request that this Court enter an Order allowing Plaintiffs to reschedule the production dates and related depositions of the third party entities Plaintiffs have subpoenaed to a date before July 4 in order to accommodate the third parties.

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[5] Defendants have also objected that the documents and depositions Plaintiffs have requested from the third parties may be unnecessary because Defendants are now willing to supplement some of their prior responses. Defendants informed Plaintiffs they would supplement "certain interrogatories and document responses" by email on June 1 but have not indicated which of their answers they would supplement, whether they would produce any additional documents, or when Plaintiffs could expect to know the answers to either of these questions. Plaintiffs also do not believe the documents they have requested from third parties is likely to be in Defendants possession, since those documents are largely, if not entirely, made up either of documents entirely internal to the third parties or between the subpoenaed entities and other third parties. Indeed, Defendants answered some of Plaintiffs' written discovery by claiming that Plaintiffs should seek discovery from third parties.

Respectfully submitted,

/s/ Richard S. Busch

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Dated: June 2, 2009

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served via the Court's Electronic Filing System:

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this 2nd day of June 2009.

s/ Richard S. Busch